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NO. 78-1529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

N. B. HUNT, W. H. HUNT, DOUGLAS HUNT, HOUSTON HUNT, ELIZABETH HUNT CURNES, ELLEN HUNT FLOWERS, MARY HUNT HUDDLESTON, AND HUNT HOLDINGS, INC., *Petitioners,*

vs.

THE COMMODITY FUTURES TRADING COMMISSION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION.

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The Memorandum for the Respondent in Opposition to the Petition for Writ of Certiorari (hereafter referred to as "Respondent's Memorandum") dodges the primary issue: complete and permanent relief is sought by the Commodity Futures Trading Commission ("CFTC") in both the judicial and administrative enforcement actions. For example, on page 5 of Respondent's Memorandum it is stated:

> "Parallel judicial and administrative proceedings are consistent with the purposes of the (Commodity Exchange) Act. Judicial relief can put a prompt halt to ongoing violations."

The authors of Respondent's Memorandum appear to misunderstand the nature of this case. Following the above-

quoted language, Respondents attempt to distinguish administrative and judicial actions on the ground that the latter "... usually have a more limited purpose." Petitioners agree. But as pointed out on pages 5-7 of the Petition for Writ of Certiorari filed herein, with respect to the instant action the CFTC seeks full and complete relief in both the judicial and administrative actions, which it admits are identical "in all material respects". (See Appendix to Brief of Appellants, *N. B. Hunt* v. *CFTC*, C.A. 7th, No. 77-1055, pp. 51-52).

Since the subject of the judicial enforcement action involves soybean futures contracts which matured almost two years ago, the suggestion that the judicial action is justified as seeking "a prompt halt to *ongoing* violations" is nonsense. The relief sought in the district court is not limited to an injunction, and the alleged violation could not possibly be ongoing. Duplicitous enforcement actions under the Commodity Exchange Act, each seeking complete and full relief, cannot be equated with limited injunctive proceedings by the NLRB, the FTC, or the SEC. See Respondent's Memorandum, p. 6.

On page 4 of the Respondent's Memorandum, it is stated:

> "But if petitioners are right that the Commission clearly is in error, the petitioners suffer no harm from carrying on with the administrative proceedings: a court is sure to vindicate them in the end, if the Commission persists in its asserted error."

As Justice Howard T. Markey noted in his dissenting opinion below, however, the CFTC's position is "at best fatuous" since the entire matter is already before the courts at the CFTC's behest. See *Hunt* v. *CFTC*, 591 F.2d 1234, 1239 (7th Cir. 1979).

Parklane Hosiery Co. v. *Shore*, No. 77-1305 (Jan. 9, 1979) is cited on page 5 of the Respondent's Memorandum as recognizing the validity of parallel judicial and administrative actions. *Parklane*, however, did not involve parallel proceedings. Unlike the instant action, in *Parklane* different plaintiffs prosecuted separate causes of action.

The quotation on page 3 of Respondent's Memorandum from *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) is inapplicable to the instant action. As noted in *Myers*, the NLRB has exclusive jurisdiction to enforce the National Labor Relations Act. The Commodity Exchange Act, on the other hand, may be enforced either in an administrative action *or* by a district court. Moreover, since NLRB orders are not self-executing, no penalty can accrue before the matter is reviewed by the courts. (303 U.S. at 48). Under the Commodity Exchange Act, on the other hand, an administrative order is effective upon issuance. The *Myers* case is further distinguished on pages 18-19 of the Petition.

On page 6 of Respondent's Memorandum it is asserted that

> "Congress recently rejected a proposed amendment to the [Commodity Exchange] Act that would have required the Commission to elect between judicial and administrative remedies. See H. R. Rep. No. 95-1181." (Bracketed information added).

As stated in said Report, however, the CFTC opposed the amendment on the ground that

> "(m)any times, in Federal court the Commission seeks injunctive relief *only*, and while the case is pending undertakes regulatory action, such as to revoke a registration or otherwise. This amendment would prevent the Commission from making use of its expertise in such instances." (Comm. Fu. L. Rep. (CCH) No. 75, June 26, 1978, p. 51) (Emphasis added).

Thus, the proposed amendment was rejected for reasons unrelated to the subject of the instant action. Consequently, there is no basis for the assertion that Congress tacitly approved duplicate judicial and administrative actions where complete and permanent relief is requested in each case. (Moreover, the proposed amendment was not rejected by Congress, as such, but by the House Committee on Agriculture).

A recent decision by the Second Circuit demonstrates the conflict between the circuit courts regarding the application of the exhaustion doctrine under the circumstances of this case. In *Touche Ross & Co.* v. *SEC,* ____ F.2d ____ (CA 2, May 10, 1979) (47 U.S.L.W. 2738), the SEC instituted an administrative proceeding under Rule 2(e) to determine whether the accounting firm had engaged in unethical, unprofessional or fraudulent conduct in auditing the financial statements of two corporations. The accounting firm thereupon brought a judicial action to enjoin the administrative proceeding, but the district court dismissed the suit because administrative remedies had not been exhausted. Reversing the district court, the Second Circuit held that while the SEC's administrative proceeding was not "plainly beyond the jurisdiction" of the agency, application of the exhaustion doctrine would have required the accounting firm to submit to the same procedures which it challenged. Since the question of the propriety of the administrative action was one of purely statutory interpretation, the Court held there was no need for the exercise of agency discretion or the application of agency expertise. Moreover, the Court noted that an administrative action would serve no real purpose since it was unlikely the SEC would invalidate its own rule. In contrast, the Seventh Circuit held in the instant action that under comparable circumstances the administrative enforcement action could not be challenged except by judicial review from final agency action.

CONCLUSION

This Court should take this opportunity to construe the relationship between § 6c and § 6(b) and (c) of the Commodity Exchange Act. The CFTC's practice of instituting duplicitous judicial and administrative actions, seeking complete relief in each, is a waste of judicial and administrative resources and an unjustifiable burden on petitioners and other similarly situated parties. This Court is respectfully requested to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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